SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 4, 2005	**DEPT. 71**	**REPORTER A:**	**CSR#**
PRESENT HON. RONALD S. PRAGER	**JUDGE**	**REPORTER B:**	**CSR#**
CLERK: K. Sandoval			
BAILIFF:		**REPORTER'S ADDRESS: P.O. BOX 120128**	
		SAN DIEGO, CA 92112-4104	

JUDICIAL COUNSEL
COORDINATION PROCCEEDINGS
NO. JCCP 4221
CASES 1,11,111, AND 1V

TITLE [Rule 1550(b)]
NATURAL GAS

JCCP 4221-PIPELINE

This matter was taken under submission on April 26, 2005. After review of the evidence in light of the arguments of counsel and the applicable law, the Court rules as follows.

A demurrer is a pleading used to *test the legal sufficiency* of other pleadings, it raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (See: CCP sections 422.10 and 589)

For the purpose of testing the sufficiency of a cause of action, the demurrer admits the truth of all material facts properly pleaded. The sole issue raised by general demurrer is whether the facts pleaded state a valid cause of action - not whether they are true. No matter how unlikely or improbable, the allegations must be accepted as true for the purpose of ruling on the demurrer. (See: *Serrano v. Priest* (1971) 5 Cal.3d 584; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593)

"The interests of all parties are advanced by avoiding a trial and reversal for defect in pleadings. The objecting party is acting properly in raising the point at his first

opportunity, by general demurrer. If the demurrer is erroneously overruled, he is acting properly in raising the point again, at his next opportunity. If the trial judge made the former ruling himself, he is not bound by it. [Citation.] And, if the demurrer was overruled by a different judge, the trial judge is equally free to reexamine the sufficiency of the pleading. [Citations.]" (*Pacific States Enterprises, Inc. v. the City of Coachella* (1993) 13 Cal.App.4th 1414, 1420, fn 3, *citing Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868) Therefore, the Court reviews, anew, Defendants' demurrer and the issues raised therein despite the fact that Judge Haden has on numerous occasions overruled the same issues.

The Court grants the parties' respective requests for judicial notice.

The General Demurrer of the Sempra Defendants is OVERRULED. The Court finds the Second Amended Master Complaint states adequate facts to constitute the claims alleged therein.

The Court finds Plaintiffs' claims are adequately pled and based on the face of the Complaint Plaintiffs' claims not pre-empted by federal law or the filed rate doctrine.

Among other things the electricity claims are not preempted because "at the time of Defendants' alleged misconduct, FERC did not have a regulatory structure sanctioning anti-competitive behavior." (*In re Western States Wholesale Natural Gas Antitrust Litigation* 346 F.Supp.2d 1123, 1133) And FERC provided no remedy for anti-trust claims. (*In re California Retail Natural Gas and Electricity Antitrust Litigation* 170 F. Supp.2d 1057, 1059-60; *Western States, supra*)

Plaintiffs' gas claims are not preempted because FERC did not regulate the natural gas "spot market" which is at issue in this case. (*In re Western States, supra* at 1134; *Wholesale Natural Gas Antitrust Litigation, supra* at 1059, 1060) "[T]he natural gas market largely was deregulated at the time of the alleged anti-competitive conduct . . . the natural gas industry was driven almost completely by the market forces of supply and demand." (*In re Western States, supra* at 1139-40) In addition, the gas claims are not preempted because courts have decided that "[n]o federal court has found the Natural Gas Act, the Federal Power Act, or the Natural Gas Policy Act pre-empt state regulation of the natural gas industry." (*In re Western States, supra* at 1132)

Plaintiffs' claims are not preempted by the filed rate doctrine. As pled, the complaint is adequate. Further, because the FERC did not regulate the "spot market" there can be no violation of the filed rate doctrine. In the electricity context, FERC regulates market based rates for the sale of electricity and some cases have determined that the filed rate doctrine applies to "market-based" rates. The filed rate doctrine may apply to "market-based" rates because

> **the market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether 'the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry.' According to FERC, these conditions assure that the market-based rates charged comply with the FPA's requirement that rates be just and reasonable. (Citations) This oversight is ongoing,. . . . FERC has clearly stated its belief that these procedures satisfy the filed rate doctrine for market-based rates. (*Public Util. Dist. No. 1 of Grays Harbor County Wash. V. Idacorp (Grays Harbor)* (9th Cir. 2004) 379 F.3d 641)**

Because the FERC did not regulate the natural gas spot market at the time of the alleged misconduct, the filed rate doctrine does not preempt Plaintiffs' claims even though the FERC has now established a market-based regulatory system.

Inasmuch as Defendants challenge Plaintiffs' complaint based on the defenses of preemption and filed rate, said challenge is inappropriate on demurrer.

The Court finds Judge Pro's April, 2005, Order is of no assistance. First, even if the Order was published, the decision is persuasive authority and not binding on this Court. Second, the Court disagrees with the reasoning expressed therein and finds it contradicts Judge Pro's previous published decisions. (*In re Western States Wholesale Natural Gas Antitrust Litigation* 346 F.Supp.2d 1123; *In re California Retail Natural Gas and Electricity Antitrust Litigation* 170 F. Supp.2d 1057) Further, the cases relied upon in the April order are inapposite to the instant matter and thus inapplicable.

Defendants' challenge as to causation is also improper at the demurrer stage as such inquiry involves factual analysis.

Based on the Court's ruling herein, the Court denies Defendants' request to stay the action.

On the face of the Complaint, the Complaint states adequate facts to constitute the causes of action alleged therein. As such, the Demurrer is OVERRULED.